IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-1412

John Borland, Jr., J. Barron Leeds, Louis Polevoy, Irving Kaplan, Irving Levy, John Niccollai, as trustees of the Welfare Fund of Local 464, Amalgamated Meat Cutters Food Store, Employees Union, AFL-CIO and Howard Marks,
Petitioners,

vs.

Bayonne Hospital, Bergen Pines County Hospital, Beth Israel Hospital, Clara Maass Memorial Hospital, Englewood Hospital Association, Greater Paterson General Hospital, Hackensack Hospital, Irvington General Hospital, Holy Name Hospital, The Hospital Center at Orange, Monmouth Medical Center, Morristown Memorial Hospital, Mountainside Hospital, Newark Beth Israel Medical Center, Riverdell Hospital, Saddle Brook Hospital, Saint Barnabas Medical Center, St. Michael's Medical Center, South Amboy Memorial Hospital, St. Joseph's Hospital, St. Mary's Hospital of Hoboken, St. Mary's Hospital of Passaic, The Blue Cross-Blue Shield Plan of New Jersey, a corporation of the State of New Jersey
Respondents.

John Borland, Jr., J. Barron Leeds, Louis Polevoy, Irving Kaplan, Irving Levy, John Niccollai, as trustees of the Welfare Fund of Local 464, Amalgamated Meat Cutters Food Store, Employees Union, AFL-CIO and Howard Marks,
Petitioners,

vs.

Richard McDonough, Commissioner of Insurance of the State of New Jersey, and James R. Cowan, M.D., Commissioner of Health of the State of New Jersey,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Equal Protection or Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit the State of New Jersey from regulating only the hospital rates paid by hospital service corporations, leaving other hospital users subject to unregulated hospital charges?

COUNTERSTATEMENT OF THE CASE

Plaintiffs, trustees and an eligible beneficiary of a union welfare fund ("Union Representatives"), instituted suit against twenty-two New Jersey hospitals, the Hospital Service Plan of New Jersey ("Blue Cross"), and the New Jersey Commissioners of Insurance and Health for alleged unlawful discrimination as a result of higher rates charged to plaintiffs than to Blue Cross for identical hospital services (PC1a to PC20a). Because of the rate differential, the hospitals and the Commissioners were alleged to have violated plaintiffs' state and federal constitutional rights of equal protection and due process of law. The Union Representatives also claimed that either the Commissioners had improperly construed and applied the New Jersey statutes governing administrative approval of Blue Cross hospital reimbursement rates or that those statutes were repugnant to the Equal Protection Clause of the Fourteenth Amendment (PC16a to PC18a).

Without deciding at that point the action against the Commissioners, the trial court granted summary judgment in favor of defendant hospitals and defendant Blue Cross. *Borland v. Bayonne Hospital*, 122 N.J. Super. 387, 300 A.2d 584 (Ch. Div. 1973) (PC32a to PC54a). The fact that the Union Representatives and others were charged more by these particular hospitals than the reimbursement rates received from Blue Cross and approved by the Commissioners of Insurance and Health was admitted. *Id.* at 393, 300 A.2d at 587 (PC36a). The separate statutory classification of nonprofit hospital service plans like Blue Cross, regulated under the provisions of the Hospital Service Corporations Act, *N.J.S.A.* 17:48-1 *et seq.*, and the rate differential resulting from regulatory approval of only the hospital reimbursement rates paid

by such plans were held to be permissible under state and federal constitutional law. *Id.* at 396-403, 300 A.2d at 588-92 (PC39a to PC47a). Endorsing the comprehensive reasoning and analysis of the trial court's opinion, the Appellate Division of the Superior Court affirmed per curiam. *Borland v. Bayonne Hospital*, 136 N.J. Super. 60, 344 A.2d 331 (App. Div. 1975) (PC81a).

The action of the Union Representatives against the Commissioners of Insurance and Health pursued a different route through the New Jersey courts for jurisdictional reasons. On motion of the Commissioners, the trial court transferred that portion of the action to the Appellate Division of Superior Court, which has exclusive jurisdiction over challenges to administrative actions of State agencies (PC61a). See *N.J. Ct. R.* 2:2-3(a)(2). The Appellate Division subsequently ordered the matter remanded to the Commissioner of Insurance for an expansion of the record, particularly with respect to the methods used and factors considered in approving Blue Cross hospital reimbursement rates as required by statute (PC62a). The Union Representatives' constitutional challenge to the rate differential was rejected for the reasons stated by the trial court in the companion action against the hospitals and Blue Cross. *Borland v. McDonough*, 135 N.J. Super. 200, 202, 343 A.2d 97, 98 (App. Div. 1975) (PC82a). Reviewing the expanded record, the court also rejected arguments by the Union Representatives that Blue Cross hospital reimbursement rates had been approved in violation of statutory requirements and under guidelines that were unduly vague. *Id.* at 202-203, 343 A.2d at 98-99 (PC83a to PC84a). Although the provisions of *N.J.S.A.* 26:2H-18 (d) require the Commissioners to "take into consideration the total costs of the health care facility," the court held that this language could not be read, as the Union Representatives

contended, to mandate rates that reimburse hospitals for their total cost outlay (which would include costs unrelated to care for Blue Cross subscribers). *Id.* In upholding the challenged administrative actions, the court noted that the legislative system obviously relies upon the Commissioners' expertise and the proper use of discretion in a very complex area, the exercise of which is expressly subject to judicial review. *Id.* at 203, 343 A.2d at 99 (PC84a).

The appeals of the Union Representatives from the decisions below in favor of Blue Cross and the hospitals and the decision in favor of the Commissioners were decided together by the Supreme Court of New Jersey. *Borland v. Bayonne Hospital*, 72 N.J. 152, 156, 369 A.2d 1, 2 (1977) (PC22). The decisions were affirmed for the reasons given below, but the court added its own particular reasons for rejecting the constitutional challenges of the Union Representatives. *Id.* Due process of law was held not to require a plenary hearing and discovery on the rate approval process because the rate differential of defendant hospitals was conceded as a fact and because the record, as expanded below, sufficiently detailed the method and procedure used in determining Blue Cross reimbursement rates to provide an adequate exposure to the statutory program as administered and implemented. *Id.* at 156-57, 369 A.2d at 3 (PC23 to PC24). Nor did the record establish the contention of the Union Representatives that the exclusion of particular operating expenses, after consideration of a hospital's total costs, in approving the Blue Cross hospital reimbursement rates was arbitrary or unreasonable. *Id.* at 157-58, 369 A.2d at 3 (PC24). The court noted that "the excluded expenses either do not involve services rendered Blue Cross subscribers, are items of expense for which recovery is had from other sources, or are not for services for which Blue Cross is

billed at a different rate." *Id.* at 157, 369 A.2d at 3 (PC24) (footnote omitted). Finally, the separate statutory classification of hospital service corporations like Blue Cross and the regulation of the rates of hospital reimbursement by such corporations without regulation of hospital charges to the general public was held to be consonant with equal protection to all hospital users. *Id.* at 159, 369 A.2d at 4 (PC26).

ARGUMENT

The Petition for a Writ of Certiorari should be denied because the method employed by the New Jersey Commissioners of Insurance and Health in approving the reasonableness of Blue Cross hospital reimbursement rates under statutes limiting such approval to the rates of hospital service corporations clearly does not deny equal protection or due process of law to other hospital users.

The decision below of the Supreme Court of New Jersey has conclusively established, as a matter of state law, that the complex administrative process used in implementing the statutes governing approval of Blue Cross hospital reimbursement rates is reasonable and consistent with legislative intent. *Borland v. Bayonne Hospital*, 72 N.J. 152, 157-58, 369 A.2d 1, 3-4 (1977) (PC24 to PC25). And the factual basis of the Union Representatives' constitutional challenge is not in dispute: the particular hospitals that are parties to this action charge more to others for services than the regulated reimbursement rates they receive from Blue Cross for services to its subscribers. *Id.* at 157, 369 A.2d at 3 (PC23 to PC24). Thus the precise constitutional issue that petitioners ask this Court to review is whether the Due Process and Equal Protection clauses of the federal constitution permit New Jersey to regulate hospital charges only with respect to hospital service corporations, leaving others subject to unregulated hospital charges.

Blue Cross is a qualified hospital service corporation regulated by the New Jersey Commissioner of Insurance under the provisions of the Hospital Service Corporations Act, *N.J.S.A.* 17:48-1 *et seq.* That Act has established a comprehensive regulatory mechanism designed to facilitate

the establishment of plans for furnishing prepaid hospital service benefits at a reasonable cost to those who choose to subscribe to such plans. Numerous provisions of the Act are clearly intended to assure that the interests of the subscribing public are protected in realizing the legislative goal. Thus hospital service corporations are deemed charitable institutions, exempt from most state and local taxes, that must be nonprofit and operated for the benefit of subscribers. *N.J.S.A.* 17:48-1, -2 and -18. Corporate bylaws must provide for proportionate representation on the board of directors by persons representing subscribers, the general public, and the contracting hospitals. *N.J.S.A.* 17:48-5. Subscriber contracts must include certain mandatory provisions, and the contractual forms and rates must be approved by the Commissioner of Insurance. *N.J.S.A.* 17:48-6 to 6.5,-6.9, -8 and -9. A hospital service corporation must maintain a minimum contingent surplus fund, and its solicitation and administration expenses cannot exceed certain fixed percentage limits. *N.J.S.A.* 17:48-10. In addition to being required to file annual financial statements, a hospital service corporation may be examined by the Commissioner of Insurance at any time concerning its finances, methods of doing business and all other affairs. *N.J.S.A.* 17:48-11 and -12. Furthermore, the Commissioner may seek injunctive relief or the appointment of a receiver whenever a hospital service corporation becomes insolvent, exceeds its powers, violates the law or operates in a manner hazardous to the public. *N.J.S.A.* 17:48-13.

In order to supplement the regulation of subscriber rates, the Legislature has granted regulatory authority over the reimbursement rates paid to hospitals for subscriber services. The constitutional challenge of the Union Representatives centers on the statutory provisions that require

hospital reimbursement rates of hospital service corporations to be "approved as to reasonableness" by the Commissioners of Insurance and Health. *N.J.S.A.* 17:48-7 and *N.J.S.A.* 26:2H-18(d). Except for these statutes regulating the reimbursement rates of hospital service corporations, hospital charges to the general public, insurance companies and other health care plans are unregulated in the State of New Jersey.* Although *N.J.S.A.* 17:48-7 prohibits noncontracting hospitals from charging a hospital service corporation rates that exceed its regular charges to the general public, the statutes do not compel a rate differential. A hospital and a group benefit plan (like that represented by the Union Representatives) are free to negotiate a rate equal to or below that paid by Blue Cross, which might reflect, for example, the magnitude of hospital use and the promptness of payment.

In assailing the constitutionality of the statutes that limit the regulation of hospital charges to the rates paid by hospital service corporations without similar regulatory authority over the rates paid by others, the Union Representatives suggest that the classification is arbitrary and that there is no rational basis for distinguishing the regulated health plans from those offered by union welfare funds. Although it is rather unusual for unregulated persons or entities to challenge state regulation that does not extend to them, it is well established that a State Legislature may regulate one kind of entity while exempting another type engaged in the same business without thereby denying equal protection. *Springfield Gas & Elec. Co. v. City of Springfield*, 257 U.S. 66 (1921); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914). *See also Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) (disparate tax treatment). In order to successfully overturn a statute on equal protection grounds, one must show that the challenged classification rests on grounds wholly unrelated to the achievement of valid state objectives. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Turner v. Fouche*, 396 U.S. 346, 362 (1970). Furthermore, the constitutionality of a legislative classification is presumed, and must be upheld if any state of facts can reasonably be conceived to support it. See *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970). A statute should not be overthrown because there are other instances to which it might have been applied. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). See also *McGinnis v. Royster*, 410 U.S. 263, 276 (1973) (noting that the Court will not pick and choose among legitimate legislative aims to determine which is primary).

* There is one other exception: The Commissioner of Health also has authority to regulate the rates paid by governmental agencies. *N.J.S.A.* 26:2H-18(b).

The conclusion of the Legislature that there was a need for comprehensive State regulation of a particular category of health care plans and the hospital rates paid by such plans must be accepted. That the State Legislature might have chosen to implement a broader social objective by regulating all conceivable varieties of health benefit plans or the rates charged to all categories of hospital users will not vitiate the separate and reasonable classification of hospital service corporations. The Union Representatives' welfare fund provides health care benefits through a mechanism that is not subject to state regulatory controls. In contrast to the strict regulatory limitations upon hospital service corporations, the way in which such union welfare funds are operated, the kinds of benefits provided, the rate of contributions by employers or employees as well as the rates of payment to hospitals are all beyond the pale of state supervision. Significantly, the

Union Representatives have made no claim that hospital benefits at rates regulated under the Hospital Service Corporations Act are unavailable to them. Any corporation organized to provide a hospital service plan as set forth in the act, may qualify for a certificate of authority to do business thereunder. *N.J.S.A.* 17:48-1 and -3. The Union Representatives do not claim to have been denied approval to provide hospital benefits through such a qualified corporation. *Cf. Hendrick v. Maryland*, 235 U.S. 610, 621 (1915). Nor do they contend that they have been unable to purchase hospital service benefits through group or individual contracts issued by Blue Cross at rates regulated under the Hospital Service Corporations Act. See *N.J.S.A.* 17:48-6.1(a) (authorizing the issuance of group contracts to labor union trust funds). When there is no insurmountable barrier to obtaining the benefits of a particular classification and state law provides reasonable ways in which to qualify for such benefits, there is no denial of equal protection to members of the excluded class. See *Labine v. Vincent*, 401 U.S. 532, 539 (1971). Simply stated, the Union Representatives have opted to provide hospital benefits through an entity neither qualified nor regulated under the challenged statutes.

The State of New Jersey regulates the hospital reimbursement rates of hospital service corporations without extending equivalent regulation to other entities and persons who pay for hospital services. Even assuming that the economic effect of that distinction could give rise to an equal protection claim, it is clear that the particular circumstances of this case do not warrant further review by the Court. The Union Representatives have made no serious attempt to argue that the relevant statutes are unconstitutional on their faces; rather, their attack focuses on "the actual administration of the statutory scheme" (PC 16). Indeed, despite the clear holdings to the contrary

by the appellate courts of New Jersey, the Union Representatives continue to charge the Commissioners of Insurance and Health with "abrogating and ignoring their statutory duty." *Id.* Such contentions were unanimously rejected in each of the New Jersey appellate courts—rejections that rested on a detailed examination of an elaborate record establishing the complex method used to determine Blue Cross reimbursement rates at twenty-two New Jersey hospitals over a ten-year period. Expansion of the Record on Remand, filed September 6, 1974. Further examination by the Supreme Court of the United States to determine the reasonableness of these administrative rate calculations, tendered for review under the label of a denial of equal protection and due process, is clearly not warranted.

CONCLUSION

It is respectfully submitted for the foregoing reasons that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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